

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MATSON NAVIGATION COMPANY,

*Petitioner,*

VS.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

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BRIEF OF INTERVENING RESPONDENTS,  
AMERICAN MAIL LINE LTD., AMERICAN PRESIDENT  
LINES, LTD. AND PACIFIC FAR EAST LINE, INC.

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United States Maritime Commission, <i>Economic Survey of the American Merchant Marine</i> (1937) . . . . .	36, 59

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---

BRIEF OF INTERVENING RESPONDENTS,  
AMERICAN MAIL LINE LTD., AMERICAN PRESIDENT  
LINES, LTD. AND PACIFIC FAR EAST LINE, INC.

---

STATEMENT

We consider the statement of petitioner to be substantially accurate but also to be insufficient foundation for the matters covered in argument. We accordingly make the following statement.

A. The Agreement

Agreement 9551 [R Ex. 14]<sup>1</sup> was filed for approval by the Federal Maritime Commission on May 25, 1966. Its preamble recites that the pressures of competition, especially

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<sup>1</sup>We cite the certified documents as "RD," the certified transcript as "RTr," and the certified exhibits as "REx."

from the merged Japanese lines, make imperative the integration of operations by American President Lines, Ltd., ("APL") and Pacific Far East Line, Inc. ("PFEL"), and the reduction of duplicating expense by APL, PFEL and American Mail Line Ltd. ("AML"); that the developing technology of the steamship industry requires the maximum of financial strength and operational flexibility; that the coordination of operations contemplated by Agreement 8485 has proved ineffective; and that it is necessary that the United States-flag lines in the trans-Pacific trades do all that may be feasible to improve the efficiency, economy and effectiveness of their operations. The salient provisions of the agreement are: (a) AML, APL and PFEL agree to merge or consolidate, with AML to be either a separate division or a subsidiary [Par. 2]. (b) Planning groups are established to develop the detail of the operating and corporate reorganization [Pars. 3, 4]. (c) The agreement will not be effective until approved by the Commission, the Secretary of Commerce, the Secretary of the Treasury, and by the stockholders of the merging lines [Pars. 7-11].

Public notice of the agreement was given on June 2, 1966 (31 F.R. 7183). Matson Navigation Company and States Steamship Company filed objections and requests for hearing.

### **B. The Hearing**

By order of August 3, 1966 [31 F.R. 10621], the Commission instituted an "investigation to determine whether the Commission has jurisdiction over Agreement No. 9551, or any part thereof, and to the extent Agreement No. 9551 is subject to section 15, whether it should be approved, disapproved, or modified."

Prehearing conference was held in September, 1966. Respondents voluntarily supplied all material requested by Matson, States and the Commission's Hearing Counsel which the Presiding Examiner indicated to be proper and relevant. The resulting prehearing exhibits and responses served by respondents in October, 1966, aggregated 716 pages. Hearings were held in San Francisco over some 14 hearing days

in November and December, 1966. Some 2139 pages of testimony were taken, and 187 exhibits introduced.

The Department of Justice on the close of hearing intervened to urge that the Commission had no jurisdiction over merger agreements under Section 15 of the Shipping Act; it took no position on the merits of the merger and did not participate in the hearing.

### C. The Respondent Lines

1. *Routes.* APL operates 25 vessels in four subsidized steamship services: (a) A trans-Pacific passenger service between California and the Far East; (b) A trans-Pacific freighter service, also between California and the Far East; (c) A Round-the-World service, operating from the North Atlantic and California to the Far East, Southern Asia, the Mediterranean and return to the North Atlantic; and (d) An Atlantic/Straits service, operating from Atlantic ports and California to the Far East and Southeast Asia and returning to California and the Atlantic ports [RD 43, pp. 7-8].

PFEL operates two services: (a) A subsidized trans-Pacific freighter service between California and the Far East with 10 vessels; and (b) An unsubsidized service between the U.S.-Pacific Coast and Guam with 5 vessels [RD 43, p. 9].

AML operates two subsidized services: (a) The so-called "short-run" service between the Pacific Northwest and the Far East, with 5 vessels; and (b) the Bay of Bengal service, with 4 vessels, between the Pacific Northwest and India-Pakistan, returning to California and the Northwest [RD 43, pp. 8-9].

The trans-Pacific freighter services of APL and PFEL follow almost completely duplicating routes between California and the Far East. The competition over this route by the APL Round-the-World and Atlantic/Straits vessels is of less importance, since they also load or discharge on the Atlantic Coast and in areas beyond the Far East. AML's Bay of Bengal service in theory has some overlap with APL's services but owing to differences in routing and transit-time

the practical competitive effect is negligible. Only the two trans-Pacific freighter services of APL and PFEL offer significant possibilities of sailing coordination after merger [RD 43, pp. 9-10].

2. *Financial.* All three lines are in good though not spectacular financial condition. In 1965 APL had net earnings of \$5.5 million on \$133 million of assets; PFEL net earnings of \$4.8 million on \$80 million of assets; and AML net earnings of \$3.2 million on \$47 million of assets. In the aggregate they earned in 1965 about 5% on total capital [RD 43, App. B, C].

3. *Relationships.* Natomas Company owns 51.1% of the APL voting stock, with another 48.2% held by Signal Oil and Gas Co. [RD 43, pp. 3-4].

In 1965 APL bought about 2/3 of the AML stock and has since increased its holdings to 92.9%. Each of the stock acquisitions has been pursuant to permission of the Maritime Administration or the Federal Maritime Board. [RD 43, p. 3].

In 1956 Natomas purchased about 29% of the outstanding PFEL stock and now owns 39.1%. Another 9.2% of the PFEL stock is in hands related to Natomas [RD 43, p. 14].

The Antitrust Division, acting under the Civil Investigation Act of 1962, 15 USC 1311, very thoroughly investigated the relations among the three lines and concluded in 1963 to take no action [RD 11, pp. 187-188; R. Tr. 115-16].

4. *Coordination.* On August 11, 1960, the Federal Maritime Board approved Agreement 8485 among APL, PFEL and AML to establish a Coordinating Committee [REx. 49]. The objective of the three lines was that—

“\* \* \* to the maximum extent feasible they should (a) eliminate any unnecessary expense which arises out of the maintenance of offices, terminals, facilities and personnel which are duplicated among themselves; and (b) eliminate any unnecessary or wasteful competition among themselves.”

The Coordinating Committee has recommended joint activity in several areas, each of which led to intercompany agreement duly approved under § 15: (a) Beginning in 1963, APL and PFEL have placed their hull and machinery insurance through a common broker. AML has recently joined the program. (b) A Los Angeles terminal is operated for the three lines by Consolidated Marine, Inc. (CMI), jointly owned by the three lines. CMI also does their husbanding in Southern California. (c) In July, 1966, the three lines agreed that CMI should establish a San Francisco office which would undertake the purchasing functions of the three lines and also set up joint electronic data processing. This economy is desired whether or not the merger is approved. Matson opposed approval of this agreement. The Commission approved the agreement [RD 26, pp. 35-37; RD 36, pp. 19-23, 27, 30, 35].

The intended objectives of the Committee have by no means been realized. So long as each line had its independent management and its independent shareholders, it could not, whatever the overall gain, be expected to agree to any step which would deteriorate its independent position [RD 26, p. 39].

5. *The Decision to Merge.* Natomas and its Board Chairman, Davies, have from time to time over the years considered the desirability of a merger of the three lines and have in the earlier years concluded against it. The savings from a merger were obvious, but Davies initially hoped that the principal benefits could be accomplished through the Coordinating Committee. Both AML and PFEL were well-managed and profitable, and the costs in reduced efficiency and morale during the transition period are large [RD 43, p. 13].

Natomas concluded in 1966 that a merger of the three companies had by then become necessary. The factors which led to that decision were many, and no one was controlling, but all made up a cumulative foundation for the decision:

(a) The Coordinating Committee had proved unable to realize more than a part of the benefits originally hoped for; (b) The potential administrative economies were shown by a report of the Coordinating Committee to be of impressive magnitude; (c) It was plain that a more effective utilization of the APL and PFEL fleets would result from sailing coordination, and that this could not be done short of merger; (d) There is a strong trend toward containerships and barge-carrying ships in the trans-Pacific trade, requiring expensive terminals and shore facilities which are more effectively used by joint than by separate operations; (e) The merger of the Japanese companies into a few large lines produced beneficial results and strengthened them. Those lines were about to undertake containerization of their services for which the six already merged lines were understood to plan a further recombination into two or three groups; (f) Finally, the vacancy in the office of president of APL which arose on May 1 presented a favorable occasion for the merger in that by persuading Ickes to take that position a principal need in the reorganization, the management of APL, could be met [RD 43, p. 13].

#### D. The Agency Decisions

The Presiding Examiner on May 18, 1967, issued a very comprehensive initial decision which held that Section 15 reached to merger agreements and that the agreement should be approved [RD 26]. All parties other than the respondents filed exceptions. These went largely to his conclusions rather than his specific findings of fact. After briefs and oral argument, the Commission on October 3, 1967, by a 3-2 vote held that Section 15 covered merger agreements. Of the three commissioners sustaining jurisdiction, one said the case should be remanded to receive evidence showing more specifically the merger plans and consequences; the other two commissioners concurred in the remand "although we consider the record in this proceeding now affords a sufficient basis upon which to take action" [RD 26, p. 18].

Respondents filed a petition for reconsideration, urging that the present record was in all respects sufficient and that the two commissioners who dissented as to Section 15 jurisdiction should go on to participate in the merits once the majority had taken jurisdiction [RD 38]. The Commission granted reconsideration and on December 26, 1967, issued a supplemental report on reconsideration [RD 43]. One of the commissioners who dissented as to jurisdiction joined in deciding the merits with the result that a majority of the Commission approved the merger agreement on the present record, with a fourth adhering to his view that a remand for further evidence was necessary and the fifth refusing to go beyond his view that there was no Section 15 jurisdiction. Respondents had suggested, in the interests of expedition, that the Commission so far as it deemed proper adopt the careful initial decision of the Examiner [RD 34, p. 123]. The Commission did so in its decision on the merits, in result of which pages 2-43 and Appendices A-I of the Commission decision [RD 43] correspond exactly with pages 25-35, 37-72 and Appendices A-I of the initial decision [RD 26].

## SUMMARY OF ARGUMENT

### I

The Commission after considering Matson's evidence and argument to support its claim of injury from the merger found that Matson would not in fact be affected. Matson has sought no review of this branch of the decision. In result it is conclusively adjudicated that Matson can suffer no adverse impact. It is not, therefore, a "party aggrieved" under 28 U.S.C. § 2344, and has no standing to seek review of any part of the Commission decision. *Interstate Electric Co. v. Federal Power Commission*, 164 F.2d 485 (CA 9, 1947). We deal with Matson's arguments out of caution, but are unable to see that they may be pressed upon this Court.

We have concluded that the Department's position in this Court does not fall with that of Matson. The United States is a statutory respondent under 28 U.S.C. § 2344, and by settled practice can urge any position it chooses. We believe this Court has jurisdiction, allowing the statutory respondent to present its case, even though the only petitioner for review is not a "party aggrieved." That is because (a) the Department became a proper adverse party before the Court should decide that Matson is not aggrieved, and (b) § 2344 should not be construed as an entrapment for the Department, which could have filed its own petition for review had it known that Matson very shortly before the statutory 60-day period ran would abandon its claim of injury or aggrievement.

## II

Section 15 of the Shipping Act, 1916, requires that there be filed for Commission approval, "every agreement controlling, regulating, preventing, or destroying competition." A merger agreement is obviously covered by these plain words of the statute.

The case in truth is just that simple. None of the many ways in which the Department or Matson seek to escape these plain words can serve their need. For the more seriously pressed examples: (a) There is no warrant in the canons of statutory construction or in the sense of § 15 for the view that the entire reach of § 15 is limited by the concluding catch-all phrase "cooperative working agreement," or confined to those agreements which admit of continuing supervision. A number of other types of agreements admittedly covered by § 15 are essentially "one-shot" agreements rather than a continuing practice or working agreement. And, in any case, the Commission if circumstances so improbable should arise can withdraw its approval of the merger agreement, freeing the Department of Justice to seek

divestiture if it chose. (b) Both § 15 and § 7 of the Clayton Act reach in their literal terms to foreign mergers. Out of comity, neither the Department nor the Commission seeks to regulate foreign mergers. This does not mean that they are therefore inapplicable to domestic mergers. (c) The familiar plea that the antitrust laws should not be repealed by implication is inapplicable here, for as the Supreme Court has held § 15 offers express not implied exemption. That Court, indeed, has virtually settled this case in its statement that § 15 offers explicit exemption from the Clayton Act, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216 (1966).

The legislative history of § 15 is not very revealing, but does show a clear intention to bring under § 15 *every* agreement between carriers.

The agency construction must be accepted by this Court unless "it lies outside the range of permissible choices." The Commission surely is not irrational in applying the words of the statute just as they were enacted. For nearly 20 years, without a single deviation, the Commission has by decision and by advice to Congress taken the position that it has jurisdiction over merger agreements under § 15. In response to such advice, the Congress in 1950 added the Commission to the agencies whose approval exempted transactions from § 7 of the Clayton Act. Similar advice was given the Congress in 1956 and 1962. After a number of earlier cases, dealing with broadly similar agreements, the Commission in 1962 squarely held that it had jurisdiction over merger agreements. *Agreement 8555, AEIL*, 7 F.M.C. 125 (1962).

The Commission is not to be stripped of its clear jurisdiction over merger agreements because three other agencies administer later-enacted statutes which have express merger provisions. They in contrast to the Commission have sweeping promotional responsibilities and it is natural that mergers should be given specific attention. And surely a later drafting specificity does not reach back to contract the reach of general language in earlier statutes.

## III

The Commission here applied the precise analysis many times approved by the Supreme Court: The antitrust policies of the nation are to be considered under the "public interest" clause of § 15. If the proposed agreement runs counter to these policies, it must be justified by serious transportation benefits. Since the Commission has recognized the need to weigh both policies, its decision on the merits of the agreement is primarily for the Commission and not for the reviewing courts. *Penn-Central Merger Cases*, 389 U.S. 486, 498-99 (1968).

The Commission properly found no significant affront to antitrust policies. The merger will discernibly reduce the competition of respondents only in the California/Far East trade. In that trade there were in 1964 some 650-700 sailings by 25 competing lines in addition to those of the respondents. The Commission found a considerable "cross-elasticity" between the liner and the non-liner trades, and considered that both should be taken in view. In terms of cargo carriage, the merged respondents would carry 26% of the liner commercial cargo and 8% of the total dry cargo.

The 26% might be a "danger area," the Commission held, but its importance was greatly reduced by the nature of the shipping industry. Ocean carriers are subject to Commission regulation; liner rates are fixed by steamship conferences and bulk rates by the tramp ships, and neither could be controlled by respondents; there is complete freedom of entry; and the foreign flag lines which are respondents' chief competitors have freely merged into large units. The Commission could also have developed the special limitation upon routes and sailings of subsidized lines, and the minute detail of their Government regulation, or the approved and immunized charter of these respondents to cooperate to avoid unnecessary competition, as further grounds for minimizing any antitrust concern.

Against this minimal impairment of antitrust policies, the Commission found impressive transportation benefits: admin-

istrative economies were available; coordination of sailings would permit more regular service and additional voyages with the same fleet; their financial strength would be increased, enabling respondents better to deal with the rapidly developing steamship technology; and by the merger respondents could better counter the recent and future mergers and consolidations of its Japanese competitors. Our opponents in the hearing gave substantially corroborating testimony. The Maritime Administration, which bears the promotional responsibility for the merchant marine, has long favored merger and consolidation of service.

#### IV

Matson asks also that the Court direct a remand for evidence additional to the prodigious amount already in the record. It finds two areas of deficiency, neither of which is persuasive. (a) Details of the reorganization plan and revised subsidy contracts are obviously of no concern in the Commission's area of responsibility, but are for the Maritime Administration as would also be any necessary protection of employees. That agency must also approve this merger before it may be completed. (b) Respondents are not able to make meaningful prediction of the trade conditions in 1972 when new vessel types will be in operation, and doubt that any guess of theirs or of the Commission as to the course of the Viet Nam war, the outcome of annual competitive bidding for MSTs cargoes, or the results of the containerization revolution, would be of any utility to anyone.

## ARGUMENT

## I

**ONLY THE ISSUE OF COMMISSION JURISDICTION  
IS PRESENTED FOR DECISION BY THE COURT**

There has been in this Court a contraction of the issues and the parties in comparison with those before the Commission. We believe that petitioner, in abandoning any claim of its own injury, has lost its standing to press its theories about Section 15 but that, as this Court has jurisdiction, the Department of Justice may as statutory respondent make its argument as to the reach of Section 15.

**A. Matson Has No Standing To Seek Review  
of the Commission Order**

1. *Matson is Conclusively Without Injury.* The Commission rules require that any party asking Commission action state "the petitioner's grounds or interest in the subject matter."<sup>2</sup> When Matson requested a hearing before approval of the merger agreement, it alleged that its "interest" in the subject matter of Agreement No. 9551 rested upon its "operation of unsubsidized vessels between the United States Pacific Coast and Hawaii" and its active exploration of "the possibility of instituting an unsubsidized waterborne service in Trans-Pacific trade including service between the United States Pacific Coast and the Far East."<sup>3</sup> These respondents

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<sup>2</sup>Matson participated as a party pursuant to Rule 3a of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.41, which in pertinent part provides that a "party who files a petition under . . . Rule 5(i), or a petition seeking relief not otherwise designated herein shall be designated as 'petitioner,'" and entitled to become a party to the proceeding. Rule 5(i), 46 C.F.R. 502.69, permits a claim for "relief or other affirmative action by the Commission" to be made by a written petition which, among other things, shall state "the petitioner's grounds or interest in the subject matter."

<sup>3</sup>Matson's Comments and Request for Hearing, June 20, 1966, at pp. 1-2. This document is not part of the record that has been certified to this Court by the Commission. We have, however, asked the Commission to file a supplemental certification which will include this material.

asserted that Matson in truth had no real “interest” in the proceeding. Matson answered that the question of its “interest” raised issues of fact that could only be resolved after a hearing.<sup>4</sup>

With the issue of “interest” thus joined, the Commission after hearing found that Matson had none. (a) As to the Pacific Coast/Hawaii trade, the Commission found the only connection with the merger to be that APL had filed for approval with the Commission a different and wholly separate agreement pursuant to which it would join with others to form a new company known as Hawaiian Lines to serve the Pacific Coast/Hawaii trade in competition with Matson. Although Matson claimed that it would be injured because the merger of APL, PFEL and AML would increase the financial strength of the company that would take APL’s place as a stockholder in Hawaiian Lines, the Commission held that “the merger is so remotely related to the Hawaiian Lines venture as not to be a material factor in whatever effect that venture might have upon Matson.” [RD 43, pp. 26-27]. (b) As to Matson’s claim that its proposed Pacific Coast/Far East containership service would be injured by the merger, the Commission found that “Despite Matson’s saturnine generalizations about the ‘potentiality for destructive competition’ from ‘further consolidation of respondents’ subsidized assets,’ the record does not establish any probability whatever that the proposed merger will have any injurious much less crippling impact upon the service Matson plans to inaugurate.” [RD 43, pp. 28-30].

Matson, neither in its petition for review nor in its brief, has in any way complained of or challenged the decision of the Commission in these respects.<sup>5</sup> Accordingly, under Rule

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<sup>4</sup>Matson’s Response to Reply to Protests and Requests for Hearing, July 16, 1966, at pp. 2, 5. This document, too, we have requested be included in a supplemental certification.

<sup>5</sup>We do not know why Matson chose not to seek review of the decision insofar as it held Matson to be without injury. As an oppo-

18, subsection 2(d), of the Rules of this Court, and the general rules of appellate review as well, Matson has abandoned, and the Court will not ordinarily consider, any contention that the Commission's findings should in these respects be overturned. *E.g.*, *Pinkston v. United States*, 278 F.2d 833, 834 (CA 9, 1960); *Greyhound Corp. v. Blakley*, 262 F.2d 401, 406 (CA 9, 1958); *Reynolds v. Lentz*, 243 F.2d 589, 590 (CA 9), *cert. den.* 354 U.S. 939 (1957). Even if the Court were nevertheless to examine this threshold issue, it could not find that the Commission's determination of no injury was without substantial support in the record.

2. *An Unaffected Petitioner Cannot Obtain Review.* Matson can obtain review in the Court only under 28 U.S.C. § 2344, which authorizes review on the petition of "any party aggrieved by the final order" of the agency. As Matson has been conclusively determined to be unaffected by the proposed merger, it is not a "party aggrieved" by its approval.<sup>6</sup>

This and other courts have so held. This Court's decision in *Interstate Electric Co. v. Federal Power Commission*, 164 F.2d 485 (CA 9, 1947), is directly in point. The Court there held that the petitioners were not "aggrieved" by the order of the Commission approving a merger of other electric companies which they sought to review. Its reasoning is equally applicable here. At the hearing before the Commission, in which the petitioners had participated, no finding was made—

"that any of them had any interest which might be affected by the order the Commission might make  
\* \* \*. The Commission's findings include no facts

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nent, we naturally suppose this decision reflected a conclusion that its case was too weak to argue. In that event, Matson's course should have been that of States Steamship Company, and it should not have sought review by this Court.

<sup>6</sup>It is noteworthy that Matson's petition for review does not contain even a conclusionary allegation that it is a "party aggrieved." The omission of this statutory requirement can in the circumstances hardly be deemed inadvertent.

from which it could be said, as a matter of law, that petitioners are aggrieved; and the omission of such findings of fact is not here urged to be in error. Nor does the petition for review allege any facts in support of its barren recital that petitioners are aggrieved persons or parties.”

The petition to review was accordingly dismissed. See, also, *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 219 F.2d 729, 731 (CA 3, 1955); *Pittsburgh Radio Supply House v. F.C.C.*, 98 F.2d 303 (CADC, 1938).

The rule is settled that the unaffected litigant before the agency, not being “aggrieved,” has no standing to seek review. Thus, in *United States Cane Sugar Refiners Ass’n. v. McNutt*, 138 F.2d 116, 120 (CA 2, 1943), the Court declared that the petitioners were not “adversely affected” or “aggrieved” by the agency regulations they challenged and thus lacked standing to seek judicial review. An adverse effect that, the Court said, confers standing must be—

“‘of sufficient immediacy and reality.’ *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 512, 85 L.Ed. 826. [It] must be a result that is not only reasonably sure to follow the enforcement of the regulations but will be ‘something more than nominal or highly speculative.’ *National Broadcasting Co. v. Federal Communications Commission*, 76 U.S.App.D.C. 238, 132 F.2d 545, 548.”

In *Cincinnati Gas and Electric Company v. F.P.C.*, 246 F.2d 688, 691, 694 (CADC, 1957), the Court pointed out that an aggrieved party must be “actually” aggrieved and that his “aggrievement must be pressing and immediate, or at least must be demonstrably a looming unavoidable threat.” And in *Associated Industries v. Ickes*, 134 F.2d 694, 705 (CA 2) *vacated as moot*, 320 U.S. 707 (1943), the Court was careful to note that “not every person is a ‘person aggrieved’” and that a competitor, to be aggrieved, had to be threatened with financial loss through increased competition that resulted from the order of which he complained.

Again, in *Simmons v. F.C.C.*, 145 F.2d 578, 579 (CADC, 1944), the Commission denied the petitioner's application to reconstruct a radio station while granting the mutually exclusive application of the intervenor. The Court ruled that as the Commission had properly rejected the petitioner's application, he had no standing to seek review of the agency's decision in favor of the intervenor:

“Since appellant's application was rightly denied he has no ground for complaint. He does not contend that he is worse off than he would have been if intervenor's application, as well as his own, had been denied. Accordingly he is not ‘aggrieved’ or adversely affected’ by the granting of intervenor's application and has no standing to appeal from it.”

The same result was reached in *Simmons v. F.C.C.*, 169 F.2d 670, 672 (CADC, 1948), *cert. den.*, 335 U.S. 846 (1949), and *Mansfield Journal Co. v. F.C.C.*, 180 F.2d 28, 36-37 (CADC, 1950).

It is unimportant, as shown by all the cases above cited, that the non-aggrieved petitioner participated in the agency proceedings of which he seeks review. See, also, *Pittsburgh & W. Va. Ry. Co. v. United States*, 281 U.S. 479, 486 (1930); *Alexander Sprunt & Son v. United States*, 281 U.S. 249, 255 (1930).

✓ 3. *Matson is No “Private Attorney General.”* If Matson were able to show injury because of the merger, it would be able to challenge the decision below on issues based upon the public interest and would not be confined to the issues which injured Matson itself. But this is because the agency decision is to the private detriment of the petitioner, and he has a proper interest in its reversal on any ground. See *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4 (1942); *F.C.C. v. National Broadcasting Co.*, 319 U.S. 239 (1943); *Associated Industries Inc. v. Ickes*, *supra*. In such cases the petitioner is held to have standing to seek to overturn an agency order on any public interest ground whatever, but

only because the adjudication he seeks will result in his own private benefit by eliminating the grievance or adverse effect that gives him standing to appeal. See Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 253, 272-87 (1961). Where, as here, the party seeking judicial review has suffered no grievance or adverse effect as a result of the agency order that he wishes to challenge, he lacks the standing to assert that challenge even as a “private attorney general.”

### B. The Department of Justice Can Urge Its Complaint That § 15 Gave the Commission No Jurisdiction

We have given much thought to the resulting position of the Department of Justice in this Court and have concluded, despite the attractions of the contrary view, that its position and standing do not fall with that of Matson. The issue is complex and so far as we know has not arisen before, nor is it likely to arise again. Our reasons follow:

1. *The Department Was Not Required to Petition.* The Department intervened in the proceedings below on the single issue of Commission jurisdiction. The adverse decision of the Commission, we believe, left the Department “aggrieved” because of its interest in an uninhibited application of the antitrust laws. It could, then, have filed a petition for review of this issue. See *United States ex. rel. Chapman v. F.P.C.*, 345 U.S. 153 (1953); *Udall v. F.P.C.*, 387 U.S. 428, 439-40 (1967); Jaffe, *Judicial Control of the Administrative Action* (1965) at pp. 540-542.

The Department, however, did not file a petition for review. It relied, instead, on its position as a statutory respondent under 28 U.S.C. § 2344. One might once have urged that the Department’s duty under § 2344 is to support the decision of the agency. But it is far too late for such a contention; the Department has for years felt free in those review proceedings to support or to attack the agency decisions just as it chooses. We conclude, accordingly, that the Department as a statutory respondent may present

its attack upon the Commission's decision that § 15 covers merger agreements *if* this case is properly pending in this Court.

2. *The Jurisdiction of this Court Has Attached.* A ruthless logic would suggest that, as Matson is not a party aggrieved, it cannot petition for review; as it cannot petition for review, the jurisdiction of this Court is not invoked by the Matson petition; as the statutory 60 day period has long since run, there is no way the Department can bring its complaint within the Court's jurisdiction. We cannot, for two reasons, believe that the Court would accept that logic, or that we should urge it.

(a) Up to the point that it determines that Matson has no standing, this Court has full jurisdiction of the case. Before it has reached that decision as to Matson's standing, the Department has entered the case as a statutory respondent and has presented an argument calling for decision of an actual controversy. We believe the result would be extraordinary if an argument proper when presented should evaporate into thin air because of a subsequent decision that another party had no standing.

(b) While it is not often that merger applicants feel called upon to guard against being unfair to the Department, an acceptance of the logic which we have rejected would present a serious question of fairness. Even if it had occurred to the Department immediately to examine the Matson petition for "standing," it was filed only a few days before the statutory period for review ran out. The Department, reasonably relying upon its position as a statutory respondent, could not possibly have filed its own petition for review after observing the defects of the Matson petition. We do not believe that 28 U.S.C. § 2344 should be construed so as to be an entrapment for the United States as a statutory respondent. *Cf. Consolidated Flowers Ship. v. Civil Aeronautics Bd.*, 205 F.2d 449, 452 (CA 9, 1953).

For these reasons we have concluded that the Department's arguments, though not those of Matson, are properly before the Court for decision.

## II

## SECTION 15 COVERS MERGER AGREEMENTS

## A. The Plain Language of Section 15

1. *The Words Are Clear.* Section 15, in explicit terms, applies to “every agreement \* \* \* controlling, regulating, preventing, or destroying competition,” between or among carriers.<sup>7</sup>

The crux of Agreement 9551 is the understanding and agreement of the three competing carrier signatories “to merge or consolidate,” under Paragraph 2, “into a single corporation, of which at least AML would be a separate division for steamship operations, or to merge or consolidate APL and PFEL into a single corporation with AML as a subsidiary.” A merger agreement quite obviously controls, regulates, prevents and destroys competition among the parties to it and must, therefore, when those parties are carriers subject to the Shipping Act, be filed for approval or disapproval by the Commission under Section 15.

This case is in truth just that simple: whether, for one reason or another, the Congress can be held to mean something other than what it said. It requires a compelling case to establish that conclusion. *Bouie v. City of Columbia*, 378 U.S. 347, 362-63 (1964); *Browder v. United States*, 312 U.S. 335, 338 (1941). No such case has been made.

Neither Matson<sup>8</sup> nor the Department of Justice disputes that a merger agreement is covered by the literal words of § 15. Nor do they concede that this is the case, but push in silence past this central point to advance a variety of peripheral theories why Section 15 should be read as though amended to cover “any agreement: \* \* \* controlling, regu-

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<sup>7</sup>The full text of Section 15 is reprinted as an appendix to Matson’s brief.

<sup>8</sup>Although we consider Matson has no standing to debate the issue, we deal herein with its arguments in case they be thought open to borrowing by the Department of Justice.

lating, preventing or destroying competition, *except an agreement to merge or consolidate.*" The following pages show that none of these theories permits escape from the plain words of Section 15.

2. *The Word "Merger" Is Not Used.* It is urged [DJ 4, Mat. 13]<sup>9</sup> that as "merger" is not mentioned, so it cannot be covered. The argument if accepted would make a shambles of every statute where the draftsman has proceeded by general description rather than by a comprehensive particularization. It would as applied to this statute decimate the Commission's Section 15 jurisdiction, since many other types of agreements are similarly covered by general description rather than precise identification.<sup>10</sup> We deal below (pp. 42-48) with the related argument that the existence of specific merger provisions in statutes administered by the ICC and CAB means that the Commission is powerless as to such matters under the Shipping Act.

3. *"Guidelines."* Matson finds an intent to exclude mergers in the absence of "guidelines" or standards by which the Commission, in supposed contrast to the agencies with specific merger language, is directed to reach decisions [Mat. 34-36].

The easiest answer is that this is a choice for the Congress, and that it chose to give precious few "guidelines" in the 1916 Act, whether in Sections 15, 16, 17 or 18. If detailed direction rather than general phrase is a requisite of jurisdiction, the Commission would be stripped of almost all its jurisdiction except for some issues under Section 14.

A second answer is that there is very little substantive choice between the 1916 Act and the statutes which Mat-

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<sup>9</sup>We cite herein the brief of the Department of Justice as "DJ" and that of Matson as "Mat."

<sup>10</sup>A few examples are terminal leases, transshipment agreements, joint service contracts, agreements calling for joint discussion of common problems, joint purchasing agreements, and agreements fixing travel agents' commission or brokerage.

son finds adequately precise. They respectively prescribe these standards for approval or disapproval of mergers:

Shipping Act [46 U.S.C. 814]	ICC [49 U.S.C. 5(2)]	CAB [49 U.S.C. 1378]	FCC [47 U.S.C. 221]
1. Contrary to public interest	1. Consistent with public interest	1. Consistent with public interest	1. Public interest
2. Detriment to commerce	2. Adequate transportation service		2. Advantage to users
3. Unjustly discriminatory or unfair	3. Effect on other railroads	2. Creation of monopoly thus restraining competition or jeopardizing a carrier	
4. Violation of Act	4. Total fixed charges 5. Interest of carrier employees		

Indeed, in contrast to 47 U.S.C. § 221, enacted in 1934 to deal with telephone mergers, the Congress in 1943 provided in § 222 standards of great specificity, spelled out in 31 subparagraphs filling 9 pages, to govern telegraph mergers. The contrast is startling, and shows that Congress is even with the same agency quite capable of providing detailed standards or none, according to the needs or the accidents of the time or the drafting.

4. § 15 Is Confined to a “Cooperative Working Arrangement.” The Department urges that Section 15 cannot apply to merger agreements because the section is limited to “co-

operative working arrangements” between separate lines [DJ 6-9, 15-17].

It is worth repeating the broad sweep of § 15. It requires Commission approval—

“ of every agreement \* \* \* fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic, allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.”

As the Supreme Court has recently held with respect to § 15, one should not take “an extremely narrow view of a statute that uses expansive language.” *Volkswagenwerk v. FMC*, 390 U.S. 261, 273 (1968). The Department’s view is not only “extremely narrow” but converts the usual rule of *ejusdem generis* into the startling principle that the whole preceding paragraph is limited by the concluding catch-all phrase, rather than the usual rule which matches the concluding phrase to the territory marked out by the preceding enumeration.<sup>11</sup>

Beyond this defect of principle, the Department’s construction would tear out of the Commission’s jurisdiction a variety of agreements which have always been subject to Section 15. For example, neither the sale of a line or of a ship to a competitor, nor an agreement not to compete, can fairly be described as a cooperative working arrangement.

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<sup>11</sup>The Department was obliged to reach back to *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) to support its principle of statutory construction and even then could produce nothing better than “*nos-citur a sociis*” as applied not to a catch-all conclusion but to the internal words of Section 10 of Article I of the Constitution.

5. *Continuing Supervision.* Matson and the Department urge that § 15 cannot reach to mergers because the Commission is unable subsequently to disapprove or to exercise a continuing supervision over the merger agreement [DJ 8; Mat. 13-14]. The Commission properly points out that this continuing supervision is appropriate and possible only with respect to a continuing practice, but that the Commission's jurisdiction is by no means so limited as to exclude agreements which in their nature do not involve an indefinitely continuing practice [RD 36, p. 11]. The decision is plainly right.

(a) The second paragraph of § 15 grants the Commission an additional power, to disapprove agreements already approved. It is in its nature a power which will be used but infrequently.<sup>12</sup> There are a number of agreements as to which the exercise of this power is not feasible: the sale of a ship or a service to a competitor are examples of agreements which have a practical immunity from reexamination by the Commission. So, too, is an agreement not to compete in the case of a competitor who would not want to compete in any event. But this practical immunity from subsequent disapproval does not mean that the Commission is stripped of its power to approve or disapprove these agreements under the first paragraph, nor that carriers are freed of Section 15 with respect to agreements which are in their nature largely immune from practical reexamination after they are first carried out.

(b) In any event, the merger agreement is just as any other agreement subject to subsequent Commission disapproval. This disapproval would not "unmerge" the companies, but it would free the Department of Justice to seek divestiture under the antitrust laws. It surely cannot be important, as

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<sup>12</sup>"Section 15 authorizes the Commission to 'disapprove, cancel or modify any agreement,' not to sit in judgment of the day-to-day operations carried out under that agreement." *States Marine Lines, Inc. v. Federal Maritime Comm'n.*, 376 F.2d 230, 242 (CADC, 1967).

Matson urges [Br. 36-37], that the enforcing agent for divestiture would be the Department of Justice rather than the Commission itself.

6. *Stock Acquisitions.* Matson urges [Br. 10-11, 37-38] that intercompany agreement is not always necessary to accomplish a merger, and that for merger jurisdiction to turn on the existence or nonexistence of a carrier agreement would be unsound. But merger without intercompany agreement is possible only with respect to corporations over 90% of whose stock is owned by the company into which it is merged. [Del. Corp. Law § 253]. Where there is substantial separation of ownership, both in Delaware and generally, and both before 1916 and at the present time, an intercorporate agreement is necessary.<sup>13</sup>

More generally, if the Congress in 1916 was concerned only with carrier agreements its provisions are not to be considered repealed because it did not concern itself with carrier shareholders. The same lack of sophistication, in terms of modern drafting, is apparent in all of the regulatory provisions of the Shipping Act. All of the provisions

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<sup>13</sup>The Delaware General Corporation Law in Section 251(b) requires agreement between the corporations signed by their boards of directors before submission of a plan of merger or consolidation to the shareholders. The sale of assets reorganization here contemplated obviously requires agreement between the buying and selling corporations. See, generally, 15 *Fletcher, Corporations* 71 (1961 revision): "The steps and formalities required to bring about a consolidation or merger, though not identical under the various statutes, are substantially the same. Having decided to merge or consolidate, as the case may be, the corporations involved prepare a plan of union and enter into an agreement to effectuate it." The need for an intercorporate agreement to accomplish consolidation or merger was equally common prior to the enactment of the Shipping Act, 1916, as it is today. *E.g.*, *Wells v. Rodgers*, 16 Mich. 525, 27 N.W. 671 (1886); *Bradford v. Frankfort, St. L. and T.R. Co.*, 142 Ind. 383, 40 N.E. 741 (1895); *American National Bank of Macon v. Commercial National Bank of Macon*, 254 Fed. 249 (CCA 5, 1918) (consolidation agreement dated 1914); *In re Interborough Consol. Corp.*, 267 Fed. 914 (S.D.N.Y. 1920) (consolidation agreement dated 1915).

of Sections 14, 15, 16 and 21 deal in simple terms with carriers and shippers, and without thought of shareholders and even without the “directly or indirectly” foothold for wrestling with technical evasions which is customary in modern drafting.<sup>14</sup> But it is one thing to criticize the simplistic drafting, and quite another to put the Commission out of business, across the whole reach of its functions, because the 1916 Congress in ignoring shareholders did not explicitly deal with all possible routes to the same end.

Finally, insofar as Matson chides the Commission for not condemning the stock acquisitions of APL and Natomas in 1954 and 1956, it overlooks the facts that these were in no way immunized under Section 15 and that the Anti-trust Division made thorough investigation of the stock transactions and concluded to take no action (*supra*, p. 4).

7. *Foreign Mergers.* Matson urges [Br. 10, 13, 39] that as the Commission did not assume jurisdiction over the 1964 Japanese mergers, this must be a recognition that § 15 does not reach to domestic mergers.

It will be observed that this contention is not made by the Department of Justice. There is a very good reason for this forbearance. The Clayton Act itself reaches to foreign mergers with the same literal force as does Section 15.<sup>15</sup> The Department, so far as we know and so far as we expect, never has applied and never will apply the Clayton Act to mergers of foreign firms doing business with the United States, so long as no American firm is involved.<sup>16</sup> The argu-

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<sup>14</sup>Only in Section 2, defining “citizen” for purposes of the vessel transfer provisions of Section 9, did the draftsman plunge into the shareholding reality back of corporate persons.

<sup>15</sup>Section 7 of the Clayton Act applies to any “corporation engaged in commerce,” and Section 1 defines “commerce” to mean “trade or commerce among the several states and with foreign nations \* \* \*” [15 U.S.C. 12, 18].

<sup>16</sup>Section 7 may well be applied to mergers of American and foreign companies. See *Bridges, Foreign Mergers under Section 7 of the Clayton Act*, 52 A.B.A.J. 360 (1966), and authorities there collected.

ment which proceeds from inactivity abroad to inapplicability at home should have more appeal to merger-minded businessmen than to the Department of Justice.

In 1964 the 11 major Japanese shipping lines were merged into 6 under the stimulus of the Japanese Government [RD 43, p. 17]. It requires no treatise on international law or the comity among nations to realize that it would have been an act of unprecedented overreaching if the Commission had asserted jurisdiction to approve or disapprove the Japanese mergers.<sup>17</sup> They represented the required implementation of an act of a foreign government, which was accomplished on foreign soil between citizens of that foreign government. There would have been no more occasion for the Commission to apply the 1916 Act to those transactions than for the Secretary of Labor to apply the Fair Labor Standards Act, or the National Labor Relations Board to apply its Act, to Japanese crews and headquarters staffs in Japan.<sup>18</sup>

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<sup>17</sup>It has been settled ever since this country took its place in the community of nations that its statutes would not be given extraterritorial application without a clear showing that the Congress so intended. The cases extend from *The Exchange*, 7 Cranch 116 (1812), to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964). The courts have been alert in the maritime field to avoid imputing an extraterritorial intention to the Congress when the result might "invite retaliatory action from other nations." *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 148 (1957); *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953). For these reasons, the courts have held the seaman's laws inapplicable even to U.S.-flag vessels in foreign ports where, despite their literal reach, they could not be applied to foreign vessels. *The State of Maine*, 22 Fed. 734 (S.D. N.Y. 1884; Judge Addison Brown); *Sandberg v. McDonald*, 248 U.S. 185, 194 (1918); *Neilson v. Rhine Shipping Co.*, 248 U.S. 205, 212-213 (1918).

<sup>18</sup>The Fair Labor Standards Act on its face covers *all* employees engaged in foreign commerce. 29 U.S.C. §§ 203(b), (d), (e), 206(a), 207(a). It has, however, been held inapplicable to workers in foreign lands. *Bernhard v. Metcalfe Const. Co.*, 64 F.Supp. 953 (D. Neb. 1946). The courts have similarly rejected the literal reach of the National Labor Relations Act to hold it inapplicable to the crews of foreign-flag ships even when in American waters. *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).

If the Commission were stripped of its jurisdiction over domestic mergers because comity precludes control of foreign mergers, it would introduce a most startling imbalance into the regulation of ocean shipping. The Department of Justice does not and cannot enforce the antitrust laws against foreign mergers.<sup>19</sup> If United States carriers were denied antitrust immunity, upon Commission approval, they would be condemned to compete without the benefits of merger except under antitrust standards while their foreign flag competitors were free to do as they chose.

8. “*Repeal by Implication.*” Both Matson and the Department, finally, place great weight upon the rule that the antitrust laws are not to be repealed, nor their exemptions expanded, by implication [DJ 11, 23; Mat. 26]. The rule is, of course, a settled one. It has, however, no application here.

(a) The cases relied upon involved a claim of antitrust immunity for a transaction which indisputably lay outside the defined area of agency power,<sup>20</sup> or an agency approval which though required by statute did not carry antitrust immunity,<sup>21</sup> or a contention that the power to approve and to immunize so far superseded the antitrust laws that they were inapplicable to an *unapproved* transaction.<sup>22</sup> There

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<sup>19</sup>There are a dozen foreign-flag lines larger than the combined APL-PFEL-AML group, with two of them three to five times larger [RD 43, App. I]. All but one of these is in day to day competition with one or more of the respondents [RD 43, App. I; RTr 1501-06].

<sup>20</sup>*Milk Producers Assn. v. United States*, 362 U.S. 458, 469-470 (1960; acquisition of assets of competitor not covered by marketing agreement exemption); *California v. Fed. Power Comm’n.*, 369 U.S. 482, 486, 489 (1962; stock acquisition not covered by certificate of public convenience and necessity provision relating to construction or acquisition of facilities).

<sup>21</sup>*United States v. RCA*, 358 U.S. 334 (1959); *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350-355 (1963).

<sup>22</sup>*Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

is here no issue of an “implied repeal” of the antitrust laws. We are dealing, with an *express* not an implied exemption. The question is whether it reaches to mergers. If it does not, we make no argument of any immunity, express or implied. If it does, the immunity is express and not implied. The “implied repeal” tag, as applied by our opponents to this case, is purest question-begging. Only if the merging companies do, not prevent or destroy competition among themselves, so that their agreement is not covered by the express words of Section 15, could there be any “implied” expansion of antitrust immunity in the application of Section 15 to a merger agreement.

Our point is established by the Supreme Court itself. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966) held the antitrust laws applicable to interconference agreements which had *not* been approved by the Commission. The conference argued that the Shipping Act contained its own sanctions so that even its violations were outside the reach of the antitrust laws. The Court made its meaning wholly clear.<sup>23</sup> It said (383 U.S. at 216-217):

“The Shipping Act contains an *explicit* provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This *express* provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15. The creation of an antitrust exemption for rate-making activities which

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<sup>23</sup>If the Department, in citing *Carnation* to show the Congress gave the shipping industry a “limited antitrust exemption” [DJ 6], had quoted the entire passage it would have served our purpose rather its own. The passage [383 U.S. at 219] is: “Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited antitrust exemption. We do not believe that its purpose would be frustrated by the application of the antitrust laws to the implementation of conference agreements which have not been subjected to public scrutiny and examination by a governmental agency.”

are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.” [Emphasis added.]

Again, *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350 (1963), held that the banking agencies could not by their approval immunize bank mergers from, and thus impliedly repeal, the antitrust laws. It said:

“No express immunity is conferred by the Act.”<sup>27</sup>

“<sup>27</sup> Contrast this with the express exemption provisions of, e.g., the \* \* \* Shipping Act, 46 U.S.C. (1958 ed. Supp. III) § 814 \* \* \*.”

We do not understand that an exemption which the Supreme Court has recognized to be express, as it obviously is, can by repetitive assertion be converted into an “implied repeal” of the antitrust laws.

9. *Carnation Recognizes Merger Jurisdiction.* The passage quoted from the *Carnation* case immediately above notes that § 15 “contains an explicit provision exempting activities \* \* \* from the \* \* \* Clayton Act[s].” This can only refer to the Clayton Act provisions dealing in § 7 with mergers, for the Clayton Act contains no other prohibition likely to be in any way applicable to agreements among water carriers.<sup>24</sup>

## B. The Legislative History of § 15

Since the words of § 15 are clear, there is no ambiguity to resolve and an examination of the history of § 15 is supererogatory. That conclusion is reinforced by the fact that the legislative history itself is far from clear. Each side must in the end derive its conclusion by an inference from silence, a form of inquiry which is notably subservient to the conclusion already reached. We urge, however, that our infer-

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<sup>24</sup>The Court surely did not envision the application of Section 15 to discriminatory or tie-in sales of commodities by water carriers, nor to anything so anomalous as a carrier agreement to install interlocking directorates, 15 U.S.C. §§ 13, 14, 19 and 20.

ences are far more reasonable than those of Matson and the Department.

1. *Domestic Mergers.* The House Merchant Marine and Fisheries Committee was directed by H. Res. 587 of the 62d Congress to carry out a complete survey of all methods used to curtail competition in the shipping industry and to [48 Cong. Rec. 9159]:

“investigate and report to what extent any vessel lines and companies . . . engaged in our foreign or coastwise or inland commerce, are owned or controlled by railway companies [or] by other ship lines or companies . . . .”

The Committee made a thorough investigation. *Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations* under H. Res. 587, 62d and 63d Congs., 1913-1914. Its report, known more commonly as the Alexander Report, comprises Volume 4 of its Proceedings.<sup>25</sup> The report repeatedly notes the destruction and control of competition in the coastwise and intercoastal trades by means of consolidations among water carriers [pp. 337-341 (Great Lakes bulk carriers); 352-353 (Alaska trade); 372-380 (New England coastwise trade); 383-386 (Middle and South Atlantic coastwise trade)]. See also, Huebner, *Steamship Line Agreements and Affiliations in the American Foreign and Domestic Trade*, 55 *Annals of American Academy of Pol. & Soc. Sci.* 75, 99 et seq. (1914) (summarizing the results of the investigation).

The Committee observed that competition in foreign commerce was controlled primarily through conference agreements [pp. 282-295, 415], whereas in the domestic trades control was for the most part exercised through control by railroads and “shipping consolidations” [pp. 403-404, 409].

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<sup>25</sup>The Alexander Report, as noted in *Volkswagenwerk v. F.M.C.*, *supra*, at 276, was incorporated into both the House and the Senate reports on the Shipping Act.

In foreign commerce, where competition was usually controlled through conferences and kindred agreements, the Committee recommended [pp. 419-420] that “any agreements, understandings, or conference arrangements” between carriers, without limitation as to their effect, be filed for approval. In domestic trades, where asset and stock acquisitions were the chief means of controlling competition, there were two primary problems; ownership of water carriers by railroads, and consolidations among competing water carriers. The Committee recommended that the ownership by railroads of canals and carriers using canals be prohibited [p. 424].<sup>26</sup>

There was no flat prohibition recommended for water carrier consolidations. The Department and Matson would have the Court conclude that the matter was simply ignored, which would have been an extraordinary inattention to what the Committee felt to be a major concern. A far more reasonable conclusion is that this branch of the congressional concern was covered by the second recommendation of the Committee report [pp. 422-423]:

“(2) That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements affecting interstate transportation, whether written or oral, and all modifications or cancellations thereof, with other water carriers, with railroads or other transportation agencies, or with shippers.”

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<sup>26</sup>The Shipping Act did not contain such a prohibition. This is undoubtedly because the recently enacted Panama Canal Act of 1912 (37 Stat. 560, 49 U.S.C. 5(14)) in Section 11 specifically forbade any railroad “to own \* \* \* control or have any interest whatsoever \* \* \* in any common carrier by water operated through the Panama Canal or elsewhere.” This the Alexander Report said would “go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States.” The Department agrees as to this history [DJ 27-28] but derives the opposite conclusion from it.

If, as this history indicates, the Congress intended Section 15 to provide control over consolidation agreements in the domestic trade, its provisions reach equally to the foreign trade.

2. *Conference Agreements and Monopoly.* The Department and Matson place their case primarily upon two sentences out of the 424 pages of the Alexander Report [p. 416, DJ 20-23; Mat. 15-17]:

“To terminate existing agreements would necessarily bring about one or two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.”

The Commission reasonably construed this passage to indicate a distaste for consolidations not subject to any governmental supervision, and a recognition that mergers of foreign lines could not be controlled by an agency of the United States [RD 36, pp. 7-8]. To this interpretation may be added that of the Presiding Examiner, that the Alexander Report was concerned with mergers and consolidations which resulted in a *monopoly* of the trade, which cannot be argued to be the case here, and was prepared to leave to the Commission’s approval or disapproval the separation of the good from the bad [RD 26, pp. 12-14].

3. *The Comprehensive Purpose.* The Supreme Court’s analysis of the legislative history of § 15 in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 274-76 (1968), seems to us to be dispositive of the issue. We excerpt here, with emphasis as in the original, passages sufficient to mark the course followed by the Court:

“The Commission itself has not heretofore limited § 15 to horizontal agreements among competitors, but has applied it to other types of agreements com-

ing within its literal terms. \* \* \* *Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 (1965), applying § 15 to lease agreements. In the latter case, the Commission said: ‘Section 15 describes in unambiguous language those agreements that must be filed; \* \* \* Since the wording of section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve.’ 8 F.M.C., at 531. \* \* \* The legislative history offers no support for a different view. \* \* \* While it is true that the attention of that [the Alexander] congressional committee was focused primarily upon the practices that had cartelized much of the maritime industry, it is clear that the concerns of its inquiry were far more broadly ranging. The report summed up the testimony before the committee: ‘Nearly all the steamship line representatives . . . expressed themselves as not opposed to government supervision . . . and approval of *all agreements or arrangements which steamship lines may have entered into with other steamship lines*, \* \* \* the shippers who appeared as witnesses . . . were in great majority of instances favorable to a comprehensive system of government supervision . . . [and] *the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation*’ \* \* \* Nothing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than follow this recommendation of the Alexander Report and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.”

The Supreme Court, in short, has found in the legislative history ample confirmation of the congressional purpose, so clearly expressed in the text of § 15, to bring into the Commission’s jurisdiction *all* agreements affecting transportation between common carriers by water.

4. *The Clayton Act.* The Department and Matson urge that the Clayton Act of 1914 shows that the Congress was able to deal specifically with mergers, and conclude that the

absence of comparably precise language in § 15 means that mergers were not covered [DJ 28; Mat. 17].<sup>27</sup>

Section 7 of the Clayton Act was directed specifically to stock acquisitions substantially lessening competition and naturally used specific language. Section 15 was directed to *all* agreements, and naturally used general language. To be sure, the Congress which enacted the Shipping Act had no general distaste for the antitrust laws. But it is indisputable that in Section 15 they rejected the antitrust laws as governance for ocean shipping, and chose instead regulation through a system which required that all anticompetitive agreements be filed with and approved or disapproved by the Commission. Section 15 is, indeed, the most comprehensive description of anti-competitive practices ever made by the Congress,<sup>28</sup> and all if approved by the Commission were expressly exempted from the antitrust laws.

5. *The 1961 Amendments.* Matson urges at some length that the 1961 amendments to Section 15 support its interpretation [Br. 19-22]. Those amendments along with others were developed in the wake of *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958) and were concerned only with steamship conference activities. Mergers were nowhere mentioned in their extensive history. Matson derives some attenuated comfort from the fact that the Congressional spokesmen approved of conference agreements regulating competition and did not mention mergers. We

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<sup>27</sup>The Clayton Act was enacted on October 15, 1914 (38 Stat. 731). This was before the Shipping Act, enacted on September 7, 1916 (39 Stat. 728) but six months after the Alexander Report of March 2, 1914 [51 Cong. Rec. 4149-50] which so largely fixed the terms of that Act.

<sup>28</sup>Section 412 of the Federal Aviation Act (49 U.S.C. § 1382), modeled after Section 15, comes the closest, but even that omits (a) giving or receiving special rates or advantages, (b) allotting ports or restricting sailings, (c) limiting traffic, (d) exclusive or preferential agreements, and (e) "destroying" any form of competition or limiting, etc., that which is not destructive or wasteful.

derive what we believe to be more substantial comfort from the fact that, although the agency position that it had jurisdiction over merger agreements was amply known (*infra*, pp. 38-39), none sought during the reenactment of § 15 to narrow its reach.

### C. The Agency Construction

1. *The Weight to be Given.* There is no longer room for debate as to the weight to be given the construction by an administrative agency of the statute which it administers. The courts are the final authorities, and “are not obliged to stand aside and rubber stamp” the agency construction. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278, 291 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968). But in reaching their decision, the courts will give deference to the agency construction, and will accept it if it had a “reasonable basis in law,” or unless “it lies outside the range of permissible choices.” *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944); *Unemployment Commission v. Aragon*, 329 U.S. 143, 153-154 (1946); *Hardin v. Kentucky Utilities*, 390 U.S. 1, 8 (1968). It is surely a “permissible” or a “reasonable” conclusion that a merger agreement is one “controlling, regulating, preventing, or destroying competition.”

2. *General.* There is no “contemporaneous construction” of Section 15, whether with respect to merger agreements or anything else. A part of the explanation is that for the first decade of the Act there was virtually no privately operated ocean liner industry, as again there was none in the period of World War II. Another part is that the predecessors of the Commission can fairly be said to have been lethargic in their enforcement and application of the regulatory provisions of the Act.<sup>29</sup> As with virtually every other aspect of

<sup>29</sup>An over-harsh indictment serves at least to illustrate the point. The Ocean Freight Industry, H. Doc. No. 1419, 87th Cong., 2d Sess. (1962), pp. 359-360: “For a period of about 45 years, lethargy and

the 1916 regulatory provisions, the first two decades of the Act contribute a largely blank page.

In more recent years there has been a very considerable record of agency construction of § 15 to cover merger agreements. Some of this has taken the form of advice to the Congress, and some of this has been accepted by the Congress. Other parts of this record of administrative construction consists of decisions of the agency. For convenience of presentation we separate these two parts of the record.

Some of the individual items would be inconclusive in themselves; others are entirely conclusive of the agency construction. Together they add up to nearly 20 years of unbroken acceptance by the agency of a § 15 jurisdiction over merger agreements. No single advice or decision of the agency during the 42 years of the life of the Shipping Act disclaims such jurisdiction.

3. *Advices to the Congress.* In 1950, 1956 and 1962 the Commission and its predecessors categorically advised the Congress that it had merger jurisdiction under § 15. This advice in turn was consistent with the natural interference from earlier advices in 1932 and 1937.<sup>30</sup>

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indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts.”

<sup>30</sup>The House Committee in 1932 reprinted a 1930 recommendation of a presidential advisory committee that the Government should not sell additional lines to United States Lines: “If natural forces bring it [a consolidation of North Atlantic lines] about, the Shipping Board has it within its power to approve or disapprove of it, and to regulate it in the public interest.” Appendix to Hearings on Merchant Marine Investigation, House Committee on Merchant Marine, Radio and Fisheries, 72d Cong., 1st Sess. (1932) at p. 184. The Maritime Commission in its “Economic Survey of the American Merchant Marine” in 1937 urged [pp. 34-35] “the consolidation and merger of lines where economies, additional earnings, efficiency and flexibility may result.”

(a) In 1950 Congress in amending Section 7 of the Clayton Act added a new paragraph exempting from the reach of that provision “transactions duly consummated pursuant to authority given by” a number of federal agencies, including the United States Maritime Commission. As originally proposed and as passed by the House, the Maritime Commission was not among the agencies listed in the exemption paragraph. This prompted the Commission to write to the Chairman of the Senate Subcommittee considering the bill. After summarizing the text of Section 15 of the Shipping Act and quoting that part of it excepting approved agreements from the antitrust laws, the Commission said:<sup>31</sup>

“It does not appear that the provisions of H.R. 2734 are intended directly or indirectly to affect the above-quoted exemption from the Anti-Trust laws provided in section 15 of the Shipping Act. However, in view of the fact that the bill contains provisions specifically recognizing an exemption in respect of transactions approved by specified agencies under statutory authority, the Commission believes that the section in question should be amended to exempt from section 7 of the Clayton Act, as proposed to be amended by the bill, the transactions approved pursuant to authority given by the Maritime Commission under statutory authority such as the afore-said section 15 of the Shipping Act, 1916. This would avoid undesirable controversy which is likely to arise from any contention that the failure to include the Maritime Commission among the agencies specifically mentioned makes agreements approved by the Commission under Section 15 of the

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<sup>31</sup>The careful and full letter of the Vice Chairman is quoted in full in the Initial Decision [RD 26, pp. 18-19]. The report of the Commission states that it is quoting the letter in full but by evident inadvertence omits the final paragraph quoted in the text above [RD 26, p. 15]. Matson, we suppose also by inadvertence, bases its argument on the assumption that the Commission letter in fact stopped short with the abbreviated quotation [Br. 22].

the Shipping Act of 1916, or other transactions approved under statutory authority of the Maritime Commission, subject to the provisions of section 7 of the Clayton Act.”

Since Section 7 of the Clayton Act is addressed solely to acquisitions of stocks or assets and to no other type of anti-competitive agreement or arrangement, the Commission’s letter necessarily establishes that the agency viewed Section 15 as applicable to merger or consolidation agreements.

So too did the Congress. The Senate Committee considered the Commission’s recommendation to be “justified,” S. Rep. 1775, 81st Cong., 2d Sess. (1950) at p. 2, and amended the bill accordingly. the bill was enacted with the Senate amendment.<sup>32</sup> To be sure, the exemption paragraph as enacted did not confer new powers upon the Maritime Commission. But the acceptance by the Congress of the Commission’s recommendation evidences its understanding of the broad scope of Section 15. For Congress would not have bootlessly exempted stock and asset acquisitions “duly consummated pursuant to authority given by \* \* \* the United States Maritime Commission” if indeed the Commission had no such authority to begin with.<sup>33</sup>

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<sup>32</sup>“Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.” *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

<sup>33</sup>Matson urges that the Congress was simply acting “in the interests of accommodation” to any jurisdictional claim of an agency [Br. 23]. To reach this surprising verdict on the legislative function it relies on two cases holding that an agency mentioned in the § 7 exceptions had no power to immunize mergers. (a) *Milk Producers Ass’n. v. United States*, 362 U.S. 458 (1960), held the Secretary of Agriculture had no power in his regulation of agricultural marketing agreements to immunize mergers. But the Secretary was included because of the Packers and Stockyards Act, not the Agricultural Adjustment Act, and was added on the request of Congressman Kefauver himself, because that Act gave the Secretary “wide powers over the operation of meat packers, stockyards and livestock commission houses.” Hear-

(b) In 1956 the Chairman of the Federal Maritime Board advised the Senate Subcommittee on Antitrust and Monopoly that “merger agreements approved by the Board under Section 15 \* \* \* and the resulting mergers, are exempt from Section 7.”<sup>34</sup>

(c) In 1962 the Chairman of the Commission reported to the Antitrust Subcommittee of the House Judiciary Committee that “section 15 and our decision in the Isbrandtsen-Export Merger case constitute notice that merger agreements between common carriers subject to the Shipping Act, 1916, which control, regulate, prevent, or destroy competition or in any way provide for exclusive, preferential or cooperative working arrangements must be filed with the Commission, and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval.”<sup>35</sup>

ings on H.R. 515, 80th Cong., p. 248. (b) *California v. Federal Power Comm’n.*, 369 U.S. 482 (1962), held only that the District Court need not stay a prior antitrust suit to enjoin stock acquisition because of a proceeding, filed a few days later, asking an FPC certificate of public convenience and necessity for the acquisition of facilities.

<sup>34</sup>Hearings on Legislation Affecting Corporate Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong. 2d Sess. (1956) at p. 527. The Chairman went on to explain why this exemption was necessary [*id.*, pp. 526-527]: “The application to common carriers by water and other persons subject to the Shipping Act, 1916, of a statute which prohibits a substantial lessening of competition would strongly tend to destroy the American merchant marine since the American merchant marine is the high cost competitor in this industry, and would tend to perpetuate chaotic conditions in the industry when such conditions result from overtoning of the trades or from other kinds of destructive competition.”

<sup>35</sup>Hearing before the House Committee on the Judiciary, Subcommittee on Progress Report from the Federal Maritime Commission, 87th Cong., 2d Sess. (1962) at p. 23. Matson somehow reads this language to mean that the Commission asserted jurisdiction only over merger agreements containing an express and redundant agreement not to compete after the merger. It also relies upon testimony of the Chairman which in no way contradicts this advice, but says that if the merger plan “calls for a noncompete,” as any merger must, then the Commission should look at it [Mat. 25].

Congressman Celler, the Chairman, obviously agreed as to the § 15 jurisdiction, and was concerned only that the Commission give adequate heed to antitrust principles.<sup>36</sup> The final report of the Subcommittee discussed at some length the then pending § 15 proceeding relating to the American Export-Isbrandtsen merger without any question as to the agency jurisdiction.<sup>37</sup>

4. *Agency Decisions.* From 1940 to 1962 the Commission or its predecessors applied § 15 to a variety of transactions which were reasonably similar to mergers. Thus, in *New York and Porto Rico Steamship Co.—Waterman Steamship Corp. Agreement*, 2 U.S.M.C. 453 (1940), the Commission held that it had Section 15 jurisdiction over an agreement providing for the sale of one carrier's good-will to the other for a ten-year period. The Commission asserted jurisdiction upon the ground that the sale necessarily implied an agreement not to compete—as does a merger agreement—and that therefore the agreement in issue controlled competition between the parties to it. In *Associated-Banning Co. v. Matson Navigation Co.*, 5 F.M.B. 336, 342 (1957), the Board noted that an agreement to transfer part or all of the parties' existing businesses to a new corporation jointly owned by them and to seek new business for the new enterprise rather than for themselves was an anticompetitive agreement that went "right to the heart of the practices enumerated in section 15." See also, *Agreements 8745 and 8745-1*, 7 F.M.C. 199, 200 (1962), where Section 15 was applied to an agreement for the sale of two vessels accompanied by the seller's covenant not to compete for one year.<sup>38</sup>

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<sup>36</sup>Hearings, *supra*, note 35, p. 22.

<sup>37</sup>The Ocean Freight Industry, H. Doc. No. 1419, 87th Cong., 2d Sess., pp. 47-48 (1962).

<sup>38</sup>These decisions are reflected in the agency's usual practice of exercising jurisdiction over agreements providing for the sale or other transfer of assets from one carrier to another accompanied by a covenant, sometimes express and sometimes implied, that the buyer will

Finally, in *Agreement No. 8555, AEIL*, 7 F.M.C. 125, (1962), the Commission asserted § 15 jurisdiction and approved a consolidation of the common carrier operations of American Export Lines and Isbrandtsen Co., accomplished by an agreement between them to transfer Isbrandtsen's common carrier business, including 14 vessels and good will, to Export, and containing a covenant by Isbrandtsen not to compete with the transferred services without Export's consent. This was for all practical purposes a merger agreement, and the Commission was urged, in elaborate arguments by a competing line and by Public Counsel, to conclude that Section 15 was inapplicable to mergers. The Commission in unmistakably plain language rejected the contention [7 F.M.C. at 128]:

“We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify *‘every agreement . . . controlling, regulating, preventing, or destroying competition.’* To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*.”

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not use the assets in competition with the seller. Exhibits REx 67 through 74 are such agreements. They have all been approved under Section 15. Agreements 8176 [REx. 70], 8209 [REx 71] and 9566 [REx 73] provide for the sale of a steamship line from one carrier to another, much like the transactions proposed here. Agreements 8057 [REx 69] and 8525 [REx 72] provide for the sale or loan of but a single vessel, assuredly a less anticompetitive transaction than when all of a line's vessels are transferred. Agreements 7612 [REx 67] and 9498 [REx 74] provide for the creation of new corporations to take over operations that would otherwise be performed by the agreeing parties, exactly the situation in corporate consolidations. Agreement 7994 [REx 68] provides for the sale of a business for a twenty-year period although no physical assets were sold.

5. *In Sum.* Respondents suggest that the settled reasons for giving great weight to an agency's construction of its own statute apply here with great force. *Every* Commission statement and decision has pointed toward its § 15 jurisdiction over mergers, in some instances with the approval of the Congress or its committees. As to the *AEIL* decision the Chairman of the Commission advised (*supra*, p. ):

“... that section 15 and our decision in the Isbrandt-Export Merger case constitute notice that merger agreements \* \* \* must be filed with the Commission, and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval. Thus, parties to such agreements do not have the option of filing the agreements for approval or carrying them out without Commission approval.”

Every dictate of orderly government indicates, when respondents, in May 1966, accordingly filed their merger agreement for approval, that they should not now be told that this was a 2-1/2 year folly, and that the Commission and its predecessors had “without a reasonable basis in law,” been guilty of a 20-year aberration.

#### D. The Merger Jurisdiction of Other Agencies

Matson and the Department each place heavy emphasis upon the specific provisions of the Interstate Commerce Act and the Federal Aviation Act, and incidental emphasis upon the Federal Communications Act, each providing for approval of mergers and consolidations, and urge that the absence of such provision in the Shipping Act means that the Commission has no corresponding power [DJ 25-27; Mat. 30-37].

1. *In General.* On the broadest level, it is evident in the first place that apples and oranges are being compared. The ICC, CAB and FCC have not only regulatory responsibilities but also sweeping promotional responsibilities. It is their job to ensure an effective transportation or communication system. It is not surprising, then, that mergers should not

be viewed in those statutes as merely a particular example in the general category of anti-competitive agreements, but should be given explicit attention. So, too, the promotional statute governing the shipping industry—the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. 1101—in Section 608 calls specifically for prior approval by a different agency, the Maritime Administration, of mergers and consolidations. The Shipping Act, 1916, in contrast, is a purely regulatory statute, concerned almost exclusively with matters relating to competition and, in some contexts, with fair rates. Within the narrower and simpler range of its authority, there is no occasion to single out mergers for special treatment differing from that to be given any other agreement “controlling, regulating, preventing, or destroying competition.”

On the drafting level, our opponents’ argument is in essence that if the Congress in later statutes legislates in detail, the general provisions in earlier statutes must be read to exclude all matters which in the later statutes received detailed attention. The contention seeks to persuade the Court to ignore chronology and history. Many of the provisions of the Shipping Act, 1916, were copied in large part from the Interstate Commerce Act as it then read. However, that Act had no provision either comparable to Section 15 or relating specifically to mergers. It only went so far as to prohibit agreements for the pooling of traffic or revenues. 24 Stat. 380. Section 15, all will agree, applies to such agreements and many more. In short, Section 15 was intended to expand the Shipping Board’s regulatory jurisdiction over carrier agreements very far beyond the I.C.C.’s existing jurisdiction as to railroads. To be sure, Section 15 was drafted in much more generalized language than the later Transportation Acts of 1920 and 1940 and the Civil Aeronautics Act of 1938.<sup>39</sup> But this does not mean that

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<sup>39</sup>The Transportation Act of 1940 and the Civil Aeronautics Act of 1938 were enacted a generation later than the Shipping Act and reflect, among other things, a style of detailed draftmanship not found in the earlier statute. The specific provisions relating to consolidation

Section 15 is obsolete or nonenforceable. It does mean that the Commission must work with a more generalized set of basic directions than do the agencies with more nearly contemporary statutes.

The posture of our opponent's argument would have been greatly improved if the Shipping Act had been drafted *after* the later statutes. If, for example, the draftsmen had adapted the general Section 15 language from an existing statute and omitted a cognate merger provision, it could be argued with some force that no merger powers were intended. But it by no means follows, when a subsequent Congress deals in another field specifically with a subject covered generally in earlier legislation, that this reaches back to eliminate the specific area from the earlier general coverage.

Against this general background we turn to the statutes relied upon by our opponents.

2. *Interstate Commerce Act.* Congress did not enact Section 5b of the Act, which gives in terms comparable to parts of Section 15 a general authority to approve anticompetitive rate matters, until 1948. This was long after it had dealt in the most comprehensive way with railroad merger and consolidation. Section 407 of the Transportation Act of 1920 amended Section 5(2) to provide that the I.C.C. could approve a consolidation and immunize it from the antitrust laws if the consolidation was (a) in furtherance of a plan to be developed by the Commission for system consolidations throughout the country and (b) in the public interest. 41 Stat. 481, 482. Section 7 of the Transportation Act of 1940, 54 Stat. 905-06, recast Section 5(2) to

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and control in the earlier 1920 Act were essential to the very proposition upon which the entire Act was based, i.e., that consolidation was necessary to the survival of adequate rail transportation in this country. Where a statute is primarily directed at accomplishing consolidation of rail carriers, it of necessity will contain specific provisions relating thereto. Where a statute is directed toward regulating anticompetitive conduct in all its many forms, it is hardly surprising that each such form is not given a specific provision of its own.

eliminate the Commission's plan of system consolidation and to permit Commission approval of mergers or consolidation which it found to be in the public interest, as that test should be applied to the inherently complex problem of an intricate railroad network with fixed tracks and fixed connections.<sup>40</sup> When Section 5b was enacted in 1948, in consequence of *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), there was accordingly no occasion to cover merger agreements. The Congress did not do so; it used precise language in describing the kinds of agreements coming under the provision. It is directed to rate-making, not to all types of agreements preventing or regulating competition.

3. *Federal Aviation Act.* The Civil Aeronautics Act of 1938, 52 Stat. 973, enacted Sections 408 and 412 in terms substantially similar to those of the present law, 49 U.S.C. §§ 1378, 1382. Section 412 is modeled upon Section 15 and might if it stood alone serve, though somewhat less clearly than Section 15,<sup>41</sup> to cover mergers, while Section 408 is directed specifically to mergers, consolidations and acquisitions of control.

We urge that in the absence of Section 408, merger and consolidation agreements among air carriers would be covered by Section 412, and that where no particularized provision is carved out of a general enactment, as is the case

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<sup>40</sup>The railroad complexities are so great as to make rail consolidation different in kind as well as in degree from air and shipping consolidations. The concurring opinion of Brennan, J. in *B. & O. R. Co. v. United States*, 386 U.S. 372, 397-438 (1967), and its annexed map, is vivid illustration of the problems produced by a densely interlocking system of fixed trackage, where a merger of two roads can have enormous consequences to connecting roads with no other access to through traffic and to towns and regions dependent upon the fixed trackage now serving them.

<sup>41</sup>It does not reach to agreements "preventing, or destroying, competition" but only to those "preventing \* \* \* destructive, oppressive or wasteful competition."

with Section 15, the general enactment retains its usual meaning and is to be applied across the full range of its language.

Indeed, the CAB has gone farther and has indicated that, even with the particularization of Section 408, merger agreements are covered by Section 412 as well, though decision is of course controlled by the more specific provisions of Section 408. *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708, 727 (1952). In the view of the CAB, both sections are applicable to mergers and the standards of one section are "additional" to those of the other.<sup>42</sup> In *Hartman v. North Central Airlines, Inc.*, 144 F.Supp. 885 (S.D. Ind. 1956), rev'd on other grounds, 241 F.2d 859 (CA 7, 1957), the District Court observed that both the acquisition of stock control by one carrier over another and the agreement providing for such acquisition had to be approved by the Board, 144 F.Supp. at 890-91, and asserted that "the first is governed by Section 408 \* \* \* and the latter is governed by Section 412 \* \* \*."

4. *Federal Communications Act*. The simple provision of 47 U.S.C. 221 relating to telephone company mergers seems to have provided no decision significant here<sup>43</sup> and the very complex code governing telegraph company mergers, 47 U.S.C. 222, has produced only one proceeding, merging the two domestic telegraph companies; that pro-

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<sup>42</sup>*Arizona-Monarch Merger Case*, 11 C.A.B. 246 (1950) ("This proceeding involves the matter of approval under sections 408 and 412" of a merger agreement); *Acquisition of Marquette by TWA*, 2 C.A.B. 1, 4 (1940) (contract for the proposed acquisition of one carrier by another is subject to approval "[u]nder sections 408(b) and 412(b)" of the Act); *United Airlines Transport Corp.*, 1 C.A.A. 723, 727 (1940) ("if a substantial part of the properties of any air carrier is subject to such contract or lease, \* \* \* the additional [to section 412] test of the first proviso in section 408(b) must be met").

<sup>43</sup>As we have already noted, Congress provided the FCC with fewer standards to govern telephone mergers than it has given the FMC in Section 15 to govern maritime merger agreements (*supra*, p. 21).

ceeding in turn contains nothing of substantial significance here. *Application for Merger of Western Union and Postal Telegraph*, 10 F.C.C. 148 (1943); see *Western Union Telegraph Co. v. United States*, 267 F.2d 715 (CA 2, 1959).

5. *Divestiture*. Finally, Matson urges that as these three agencies (along with the Federal Reserve Board and the Federal Trade Commission) have under Section 11 of the Clayton Act the power to enforce the Clayton Act, and thus to order divestiture in cases of violation, this somehow means that only these agencies have power to approve merger agreements (Br. 36-37).

The legislative history of section 11 demonstrates beyond doubt that it was intended only to provide an additional remedy against antitrust law violators, 51 Cong. Rec. 14461, 15943 (Sen. Culberson); 51 Cong. Rec. 16319 (Rep. Floyd); S. Rept. 698, 63d Cong., 2d Sess (1914) at p. 41. Had Congress in 1950 considered agency section 11 enforcement powers essential to exemption for agency-approved transactions under section 7, it would not have included the Securities Exchange Commission, the Federal Power Commission, the Maritime Commission and the Secretary of Agriculture among those listed in the exemption paragraph added to section 7.

It is true that the Court in *California v. Fed. Power Comm'n.*, 369 U.S. 482, 486 (1962) in one passing sentence mentioned the Power Commission's lack of § 11 enforcement powers as confirming its conclusion that a power to approve the acquisition of facilities was not an implied power to immunize mergers. The relevance was not explained, and the brief passage is surely insufficient to make a Clayton Act enforcement power a condition precedent to a power to approve and immunize. This is made plain enough by the recent *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485, 501-02 (1967) which spelled out the different standards involved in approving a merger or consolidation under § 5 of the Interstate Commerce Act and, on the other hand, enforcing the Clayton Act against incipient violations.

The two functions are separate and unrelated, and not interdependent conditions to the exercise of either power.

### III

#### THE COMMISSION PROPERLY WEIGHED BOTH THE TRANSPORTATION AND THE ANTITRUST POLICIES OF THE UNITED STATES

If we are right that Matson, for want of an interest of its own, has no standing, then this and the succeeding part of this brief deal with issues not before this Court. We discuss them only out of caution.

##### A. The Commission Applied the Correct Standard of Decision

This Commission has for some years been alert to its duty of weighing and balancing the frequently opposing requirements of antitrust and maritime policies. See, e.g., *California Stevedore & Ballast Co. v. Stockton Port District*, 7 FMC 75 (1962); *Mediterranean Pools Investigation*, 9 FMC 264 (1966); *Passenger Steamship Conferences—Travel Agents*, 7 FMC 737 (1964), 10 FMC 27 (1966), rev'd, 372 F.2d 932 (CA 2, 1967), in turn rev'd 390 U.S. 238 (1968). In the *Travel Agents* case, the Supreme Court on March 6, 1968, went out of its way to approve "the Commission's careful explanation on remand of the connection between its anti-trust standard and the public interest requirement." *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). Matson accordingly labors under some disability in its effort to show that the Commission lacks understanding of its task. It certainly does not establish that conclusion by its specific arguments, to which we now turn.

1. *Burden of Proof.* Matson's major attack is upon an artificial issue: who bore the burden of proof that transportation benefits outweighed any antitrust objections to merger [Br. 42-50].

(a) It matters not at all whether the burden of justifying a restraint of competition is one of going forward with the

evidence or is a substantive burden of proof. It matters not at all whether that burden arises on a showing of *any* restraint of competition, of a *prima facie* violation of the antitrust laws, or of an established or of an *per se* violation. The respondents came forward with a prodigious amount of evidence of the maritime transportation gains from this merger. The facts were contradicted by no party and the conclusions were accepted by the Examiner and by the Commission [RD 26, pp. 39-44; RD 43, pp. 13-18]. The respondents came forward, too, with an equally prodigious amount of evidence to show that the merger would have only negligible impact upon the policies of the antitrust laws. That evidence was uncontradicted, though our conclusion was disputed, and was discussed *in extenso* and accepted by the Examiner and the Commission [RD 26, pp. 44-45, 59-72; RD 43, pp. 18-19, 31-43]. Whether or not the burden of justification lay upon the respondents, they have carried it.

(b) If the academic question of burden of proof *is* to be debated, it seems evident that the Commission was correct. It recognized, first, that “The ‘public interest’ within the meaning of Section 15 includes the national policy embodied in the antitrust laws.” [RD 43, p. 31]. It then said that if either a “*per se*” or a “*prima facie*” violation of the antitrust laws is shown,<sup>44</sup> then “some serious transportation need or important public benefits must be shown to overcome the *prima facie* invasion of the public interest in competition” [RD 43, p. 31]. This is precisely the analysis made by the Supreme Court, two months later, in *FMC v. Svenska Amerika Linien* (390 U.S. at 243-246).<sup>45</sup>

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<sup>44</sup>It used, in case there be a difference in the content of the words, “*per se*” once [RD 43, p. 30] and “*prima facie*” three times [RD 43, pp. 30-31].

<sup>45</sup>The Court in *Svenska Amerika* said:

“The Commission has formulated a principle that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can ‘bring forth such facts as would demonstrate that the . . . rule was required

Matson develops, over 9 pages, its views as to the sort of burden of proof the merger applicants should be required to carry [Br. 42-50] but at no point suggests where or how the Commission has formulated a different or a wrong standard. The inference from its concluding discussion of the scope of § 7 of the Clayton Act, of subsidy proceedings, and of the 1962 Inter Agency Committee [Br. 46-50] is that in truth it objects not to the formulation of the issue, or to the prefatory discussion of burden, but rather to the decision on the merits.

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by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.' See F.M.C., at . In the present case, but for the partial immunity granted by the Act, both the tying and unanimity rules undoubtedly would be held illegal under the antitrust laws, and respondents failed to satisfy the Commission that the rules were necessary to further some legitimate interest.

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"\* \* \* Congress has, it is true, decided to confer antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard."

2. *Matson's Position.* This brings us back again to the basic anomaly of Matson's position in this Court. It does *not* say that the Commission's conclusion is wrong, and in essence takes no position on that score [Br. 41, 73]. That, it claims, could be determined only upon a greatly expanded record. Yet Matson bears its own responsibility for any deficiency which it now finds in the record: no demand for data by Matson was refused, no Matson evidence was excluded, and no examination of respondent's evidence or witnesses was precluded. It is too late for Matson to rise above its own battle, and now to claim that it really cannot yet tell whether the merger should be approved or not.

We nevertheless show in the following pages that the Commission made very full and entirely adequate analysis both of the antitrust and of the maritime transportation policies as applied to the facts of this merger.

3. *The Decision is For the Commission.* It will be remembered, in our discussion of the evidence before the Commission, that if it correctly recognized its duty of appraising both the antitrust policies and the transportation benefits, as it obviously did, its decision on the merits is not to be lightly overturned. As the Supreme Court recently said in *Penn-Central Merger Cases*, 389 U.S. 486, 498-499 (1968):

"With respect to the merits of the merger, however, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence."

## B. There Is No Discernible Invasion of Antitrust Policies

1. *The Relevant Market.* The Commission, bearing in mind that the service patterns of the respondents were fixed by their subsidy contracts, found that there was a significant overlap in service only with respect to the trade between California and the Far East. It accordingly determined this to be the relevant geographic market. [RD 43, pp. 7-10, 32-33.] This is obviously a correct definition of "the area of competitive overlap, [where] the effect of the merger will be direct and immediate." *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963). It is not challenged by Matson.

Matson does object to the fact that the Commission took into view *both* the liner and the total dry cargo market, rather than looking to the liner market alone [Br. 54-55]. We can imagine no issue more clearly reserved to the expertise of the administrative agency. If its conclusion of "cross-elasticity" must be justified in this Court, it should be sufficient that, as the Commission found [RD 43, pp. 34-35], non-liners in this trade carry about half as much general or package cargo as do liners, while liners carry about 15% as much bulk as do non-liners. Otherwise viewed, 41% of outbound commercial liner cargoes are bulk cargoes and 81% of inbound non-liner cargoes are general cargo; the inbound general cargoes are divided 52% on liners and 48% on non-liners [RD 43, App. F].<sup>46</sup> It seems to us as to the Commission indisputably clear that in considering the merger of

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<sup>46</sup>Matson takes very considerable liberties with the decision of the Secretary of Commerce in *United States Lines-Subsidy, Route 12*, 5 P&F SRR 671, 674. The Secretary did *not* decide "that cargo carried by non-liners is not generally susceptible of carriage by U.S.-flag liner vessels" [Br. 55] but only that those types of bulk cargoes which were not in fact susceptible to that carriage, should be ignored in determining adequacy of U.S.-flag service. Such cargoes on remand to the Maritime Subsidy Board were found to be only coal and scrap iron. 5 P&F SRR 969, 974 (1965).

respondents' liner services one must look both at the liner and at the total dry cargo trades.

Matson renews its complaint in this Court that the Commission did not first adopt the liner trade alone, and then subdivide this into the U.S.-flag liner trade, to determine the relevant market [Br. 53-54]. The Commission rejected this subdivision in view of the obvious competition between U.S.- and foreign-flag vessels, and the small likelihood that the U.S. Government in determining the conditions for shipment of its "preference cargo" would be affected by this merger [RD 43, p. 34]. We cannot imagine that an agency decision of this nature would be reexamined in any court or that, if reexamined, it would be reversed.

2. *The Share of the Market.* Matson nowhere mentions what we believe to be the salient factor in consideration of the impact of the merger upon antitrust policies. There were in 1964 851 outbound liner sailings and 785 inbound liner sailings between California and the Far East; had the respondents been merged there would have remained 692 outbound and 652 inbound sailings made by 22 competing lines outbound and 25 inbound [RD 43, p. 18, App. D]. There is obviously no discernible tendency in this merger toward foreclosure of the market or exclusion of competitors.

In terms of cargo carriage the respondents in 1964 would have carried about 26.1% of the liner commercial cargo and about 7.8% of the total dry cargo in the trade [RD 43, App. G]. The Commission found that 26.1% represented a high concentration of cargo carriage, while 7.8% gives no cause for concern; it went on to note that most liner trades are "basically oligopolistic," so that there are relatively few liner operators [RD 43, p. 35]. It did not determine whether those shares of the market would be a violation of § 7 of the Clayton Act, because it was not its function to make that decision but only to locate the "danger areas" in order to weigh them in determining the public interest [RD 43, pp. 35-37]. Its decision seems obviously correct, and was based squarely upon recent and controlling Supreme Court

authority, *Seaboard Air Line R. Co. v. United States*, 382 U.S. 154 (1965); *Florida East Coast Ry. Co. v. United States*, 386 U.S. 544 (1967); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 186 (1959). These cases have, even since the Commission's decision, once again been approved by the Supreme Court. *Svenska Amerika Linien, supra*, at 245 n. 4.

3. *The Context of the Shipping Industry.* The Commission, having thus isolated a "danger area" if antitrust principles were to be applied in the abstract, took the next step required in an antitrust analysis—an examination of the merger in the context of the particular industry [RD 43, p. 38].

It found: (a) Ocean carriers in the foreign commerce were subject to Commission regulation sufficient to prevent abuse. (b) Rates were fixed by steamship conferences and respondents would have only a minority vote (ranging from 1 of 7 to 1 of 18) in these conferences. (c) Rates on bulk commodities are fixed by the non-liner competition and could not be affected by respondents. (d) There is complete freedom of entry by any line into any ocean trade.<sup>47</sup> (e) The foreign-flag lines are wholly free of American antitrust policy and the respondents' major competitors, the Japanese-flag lines, under Government pressure had in fact merged into larger units [RD 43, pp. 38-40].

The Commission could appropriately have gone further, and recognized the special circumstances surrounding these lines because each is subsidized under the Merchant Marine

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<sup>47</sup>The Commission chose to rely upon Sen. Rpt. No. 860, 87th Cong., 1st Sess., which contrasts the ease of entry by non-scheduled carriers with the costs of establishing a regular liner service [RD 43, p. 39]. Matson converts this into a concession that there is not easy entry into the liner trades [Br. 57]. If the new liner operator buys his ships and establishes an elaborate shore-side organization, it is costly. But the evidence in this case showed that a liner service using chartered ships could be started with a very small investment and that this was very frequently done in the trans-Pacific trades [RTr. 1134-35].

Act, 1936. (a) Their routes and their minimum and maximum sailings are closely fixed by the subsidy contracts [RD 43, pp. 7-8] and can be expanded only with Maritime Administration permission after public hearing, Merchant Marine Act, 1936, Sec. 605(c). (b) The subsidy contracts provide that each operator “to the extent from time to time prescribed by the United States \* \* \* shall \* \* \* coordinate the spacing, regularity and frequency of its sailings \* \* \* in conjunction with the operations of any and all other subsidized United States flag services \* \* \*.” [REx. 77]. There are compelling practical reasons why this authority cannot in fact be exercised by the Government, but the provision is eloquent testimony to the drastically limited area of competition considered proper for a subsidized steamship line. (c) The three respondent lines are removed by a still further step, and a long one, from the normal area of antitrust concern. They have entered into Agreement 8485, approved by the Commission and immunized from the antitrust laws [REx. 49]. Its basic objective is that—

“\* \* \* to the maximum extent feasible they should  
 (a) eliminate any unnecessary expense which arises out of the maintenance of office terminals, facilities and personnel which are duplicated among themselves; and (b) eliminate any unnecessary or wasteful competition among themselves.”

(d) Beyond all of these specialized limitations upon free competition is the simple fact that the subsidized line is probably the most closely regulated industry in the American economy. We have summarized [in RD 20, pp. 91-99] the extraordinary reach and detail of this governmental supervision, which reaches to every aspect of operations, finances and policy and it would be redundant to repeat that summary here.

### C. The Commission Properly Weighed the Transportation Benefits

Along with the foregoing considerations which show little if any impact upon the antitrust policies, the Commission gave thoughtful attention to the transportation benefits resulting from the merger. Matson has what we should suppose to be an impossible burden in persuading this Court to substitute its judgment for that of the administrative agency in a field such as this. We shall be correspondingly brief.

1. *Administration.* The Commission found: (a) The merger would strengthen management. (b) Administrative savings from consolidation of headquarters and branch offices would be about \$1.7 million a year, of which only about \$750,000 could be realized through "maximum theoretical use of the 'coordinating committee' procedures." [RD 43, p. 14].

2. *Vessel Operations and Cargo Carriage.* The Commission found: (a) Duplicating calls by APL and PFEL at minor ports would be avoided, while still giving adequate service to these ports. (b) This would permit the combined trans-Pacific fleets to operate about 4 additional voyages a year with the same vessels. (c) It would be possible to have a vessel of the merged trans-Pacific fleets on the San Francisco and Los Angeles loading berths every day of the year. (d) "With the flexibility provided by a larger fleet, schedules could be more readily and effectively adjusted to compensate for delays caused by wind and weather, port congestion, labor difficulties, breakdowns and the like." [RD 43, pp. 14-15].

3. *Financial Strength.* The Commission found: (a) While each of the respondents is in good financial condition, the industry historically is not attractive to investors and the abnormal cargo demands arising from the Viet Nam war may be hoped not to continue indefinitely. (b) Merger would permit easier accommodation to the recurrent delays in payment of operating subsidy receivables. (c) Earnings of the three companies, which vary out of synchronization, would be stabilized [RD 43, p. 16].

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4. *Developing Technology.* The Commission found: (a) Containerization of the trans-Pacific trade is already at hand. (b) Shoreside facilities can be put to fuller and more economical use with a larger operation. (c) The increased financial strength of the merged companies will facilitate their adaption to the rapid technological changes. (d) With a larger fleet there is more flexibility and a greater opportunity to develop specialized vessels. [RD 43, pp. 16-17.] Only three weeks after the Commission decision, its analysis received authoritative support in *Penn-Central Merger Cases*, 389 U.S. 486, 500-501 (1968), where the Court said, so far as here relevant:

“The Commission carefully considered the implications of the fact that the Pennsylvania and the New York Central, as individual systems, have operated at a profit, and that there are reasonably good prospects for a continuation of such operation. But it was impressed by the fact that, as individual systems, these profits are not sufficient to put the roads in a position to make improvements important to the national interest, \* \* \* The Commission emphasized that the merger would enable the unified company to ‘accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service.’”

3. *Japanese Mergers.* The Commission found: (a) In 1964 eleven major Japanese lines were merged into six. This was done in response to inducements provided by the Japanese government. (b) Each of the merged Japanese lines is larger than would be the merged respondents, and each operates in the trans-Pacific trade. (c) The Japanese lines have been strengthened by the mergers “and give promise of putting added pressure on respondents and other carriers to improve their economic performance” [RD 43, pp. 17-18]. To this, the Commission might have added that the record has uncontradicted testimony to the effect that the merged Japanese lines are expected to recombine again into two or three groups for container operations [RTr. 984-86].

6. *U.S.-Flag Participation.* The Commission found: (a) The share of the liner commercial cargo and of total dry-cargo carried in the trade from California to the Far East is steadily decreasing.<sup>48</sup> (b) It would serve the public interest, bearing in mind that merger restrictions operate only against U.S.-flag vessels, "to permit a merger that would improve the efficiency and ability to compete of U.S.-flag vessels serving this as well as less profitable trades, without stifling or excluding either U.S. flag or foreign flag competition" [RD 43, pp. 40-41].

7. *Respondents' Opponents.* Our opponents before the Commission included States Steamship Company as well as Matson. The ranking officials of each themselves testified to the transportation gains to be realized by the merger. Thus Dant has testified, for States, that the merger would permit respondents to offer more effective port coverage in the Far East, to increase the frequency of their service, to turn their vessels around more quickly, and better to use specialized vessels [RTr. 1469-72]. He has testified, with support in the Japanese trade press, that the merger might be sufficiently effective to provoke Japanese counter-measures [RTr. 1446, 1513]. Scott, for Matson, has agreed as to the effect of flexibility of service [RTr. 1713-15, 1718] and has complained that the merger would make respondents financially stronger [RTr. 1755, 1908] while their administrative economies through joint purchasing would give the respondents a competitive advantage [RTr. 1756-59].

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<sup>48</sup>It summarized the statistics in its Appendix H as follows:

"From 1954 through 1964, the percentage of liner commercial cargo carried by U.S. flag vessels between California and the foreign area of TR 29 decreased steadily from 74% to 43% outbound and from 60% to 37% inbound. Of total commercial cargo carried in dry cargo vessels from the same areas, the share carried by U.S. flag vessels decreased steadily from 56% in 1954 to 10% in 1964, outbound and from 59% in 1954 to 20% in 1964, inbound."

8. *Maritime Administration Policy*. It will be remembered that in 1961 the combined functions of the Federal Maritime Board were split, with the regulatory functions given to the Federal Maritime Commission and the promotional functions to the Maritime Administration.<sup>49</sup> The latter agency and its predecessors have regularly recognized that consolidation of competing lines is an effective and desirable method of strengthening our merchant marine. Thus, the United States Maritime Commission urged in 1937 that U.S.-flag carriers consolidate or merge if “economies, additional earnings, efficiency and flexibility may result.” USMC, *Economic Survey of the American Merchant Marine* (1937), at pp. 34-35. Chairman Kennedy of the Commission believed that American lines had to consolidate into ten or twelve giants in order to compete with the large foreign-flag combinations. Editors of *Fortune*, *Our Ships: An Analysis of the United States Merchant Marine* (1938), at p. 151. In the same year the Commission urged that the two lines serving South Africa continue “efforts to effect a merger or consolidation” and, if unification could not be achieved, do whatever they could “to eliminate, as far as possible, competition between two American companies, and to enable both American companies to cooperate in competing against the foreign lines.” *American South African Line, Inc.—Subsidy*, 3 U.S.M.C. 277, 287 (1938).

The Maritime Administration and its predecessors have sanctioned the unification of States Steamship with Pacific Transport Lines (FMB Annual Report, 1957, at p. 9); United States Lines with South Atlantic Steamship Line (FMB Annual Report, 1956, at p. 9); Moore-McCormack with Pacific Argentine-Brazil Line, Agreement 8176 [REx. 70]; Moore-McCormack with Robin Line, Agreement 9209 [REx. 71]; Grace with Pacific Republic Line, Agreement 9566 [REx. 73]; and the major merger between American Export Lines and Isbrandtsen Co., *Agreement 8555, AEIL*, 7 FMC 125. The Maritime Administration has actively encouraged

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<sup>49</sup>Reorganization Plan No. 7 of 1961, 75 Stat. 840.

merger between AML and APL [REx. 60; RTr. 845-49] and consolidation of passenger operations by American-flag carriers generally [REx. 79]. In short, consolidations among U.S.-flag lines have been considered as generally helpful and sometimes essential in achieving the goals of the 1936 Act.

9. *Economies and Efficiencies in General.* As we read Matson's argument it seeks to brush away this impressive catalog of transportation benefits by the argument that increased economy and efficiency benefit primarily the owners of the steamship lines [Br. 58-60]. The Commission supplied the practical answer: "that is what brings mergers about," [RD 43, p. 41]. It has for many years been settled as to carriers that "The public interest is served by encouraging efficiency in operation," *N.Y. Central Securities Co. v. United States*, 287 U.S. 12, 23 (1932). Here, as in *Penn-Central Merger Cases*, 389 U.S. 486, 500 (1968), the "evidence attested to the probability of a significant benefit from the merger, not only to the railroads and their investors, but also to shippers and the general public."

#### IV

### THERE IS NO OCCASION TO REMAND THE PROCEEDING FOR ADDI- TIONAL EVIDENCE

As we have indicated, one of the five Commissioners is of the view that, while Section 15 gives the Commission jurisdiction over merger agreements, the case should be remanded for additional evidence [RD 36, pp. 24-27; RD 43, pp. 48-55]. Matson supports that dissenting opinion in this Court [Br. 68-73]. Here as with the preceding part of this brief, the issue is before the Court only if Matson has standing.

#### A. The Basic Confusion

Matson, as the dissenting Commissioner, demands in essence that the respondents, to obtain approval of their merger agreement, lay before the Commission for its decision a variety of details, such as those to be found in the

SEC proxy statement when filed, showing every corporate aspect of the proposed merger [Br. 69-71].

Matson forgets that, in contrast to the ICC and CAB upon whose practice it relies, the Commission does not have promotional responsibilities but only supervises carrier agreements with respect to the competitive matters covered by the Shipping Act, 1916. These respondents must not only secure the approval of their merger agreement under § 15 of the Shipping Act, but also a whole series of additional approvals from the Maritime Administration under the Merchant Marine Act, 1936.

The Commission quite properly refused to reach out to enter decision on matters not entrusted to it under the Shipping Act. Once it is realized that its concern, in contrast to that of the Maritime Administration, is limited to the competitive effects of the merger, to the balancing of antitrust policies and transportation benefits, it is evident that there is no defect of any sort in this very extensive record.

## B. The Specific Complaints

1. *Plan of Reorganization.* Matson complains that the record does not contain the full plan of corporate reorganization, including apparently the stock valuations between the companies [Br. 69-70]. These matters, of course, must be examined and approved by the Maritime Administration before its final approval of the merger will be given. It is of no conceivable concern to Matson, or to any other competitor, how the corporate details are handled. It is of no concern to the Commission, nor to this Court in review of the Commission, since the corporate details cannot possibly have any bearing upon the degree to which the merger affects competition or the nature of the transportation benefits to be derived from it.

Not only are these details irrelevant under § 15, but an insistence that they be completed before approval would, in an industry as unstable as shipping, be a practical bar to any merger and in effect a contraction of the statutory juris-

diction. Shareholders of steamship lines simply will not agree on stock valuations some years in advance of the fact, and until that is at least substantially agreed it is close to impossible to draft plans of reorganization. But assuming these obstacles were overcome, the logic of Matson's position (to say nothing of its predispositions) would lead immediately to a demand for the revised subsidy contract negotiated with the Maritime Administration, the terms of the agreements with the Treasury Department, and the like. These matters simply cannot be accomplished on a contingent basis to be put into deep freeze awaiting some years of litigation.<sup>50</sup>

2. *Future Fleets.* Matson insists that the Commission cannot act without detailed information on the method of operation of future fleets and in future circumstances [Br. 71-72]. We can only repeat what we said, to the presumed satisfaction of the Commission, in our petition for reconsideration [RD 38, pp. 9-10]:

“If we must prove as a ‘supportable conclusion’ the speculative and unpredictable future of the trans-Pacific steamship trades, we cannot gain approval of this merger. Specifically: (a) Two-thirds of the outbound cargo is related to the Viet Nam war; we can have no idea as to the nature of this movement in 1969 and 1970. (b) The carriage of MSTs cargo, at any stage short of a severe shortage of berth line space, depends upon the unpredictable result of the annual competitive bidding for this cargo. (c) The PFEL LASH<sup>51</sup> ships will to be sure force a top-to-

<sup>50</sup>We sought in our petition for reconsideration to reassure the dissenting Commissioner by suggesting that the merger agreement be approved subject to reopening within a stated period after the SEC proxy statement and the Maritime Administration subsidy contract had been filed with the Commission and the parties [RD 38, pp. 11-12]. The suggestion was opposed by the parties and ignored by the Commission.

<sup>51</sup>“Lighter-aboard-ship.” This is an untried concept of ocean transport by which cargo is loaded aboard barges which are lifted in mid-

bottom revision of the sailing plans of the merged company, but the first LASH vessel will not be delivered until mid-1970 and the last not until the spring of 1972. We cannot sensibly plan itineraries or map integration so far in advance. (d) The trans-Pacific trade is at the threshold of a containerization revolution; these respondents along with most other lines are in an earnest but not yet completed search for answers as to terminal facilities, vessel types, inland integration and a score of other novel problems. We should be delighted if we could in these areas offer 'supportable conclusions.' We cannot, and do not believe the Commission would be interested in guess-work.

"We thought when we prepared this case, and think today, that any such effort to prove the unprovable would be futile and meaningless, and would produce endless debate and controversy. We did just what steamship men do in forming their own decisions: we made our proof in terms of today, recognizing that tomorrow would be different but assuming that what is good today would also be good in the unknown context of tomorrow."

3. *Employees.* Matson would have this case sent back for an exegesis of the impact of the merger upon employees [Br. 72]. This is quite obviously unrelated to the Commission's § 15 responsibilities. It is more nearly related to the Maritime Administration responsibilities under the Merchant Marine Act, 1936, Title III of which is specifically directed to employee protection.<sup>52</sup> If any employee-protective provisions were necessary, which we cannot believe,

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stream aboard the ocean carrier by shipboard crane. It obviously will require a fundamental revision of many shipping practices.

<sup>52</sup>Section 301 requires minimum manning and wage scales for seamen. It is true that with the passage of the years, the strength of the unions has become such that the Maritime Administration concern is now directed to what it feels may be excessive wages and manning. See, e.g., *Collective Bargaining Agreements*, 6 P&F SRR 1, 17, 25, 37 (1965).

the Maritime Administration not the Commission is obviously the more appropriate agency.

4. *Subsidy Recapture.* It can hardly need argument to show that the Maritime Administration, not the Commission, is the agency which has jurisdiction to bring subsidy "recapture" under the Merchant Marine Act, 1936, into consideration and to take whatever steps are necessary to protect the interests of the Government [Mat. 73].

### CONCLUSION

For the foregoing reasons, the order of the Commission approving the merger agreement and dismissing the proceeding should in all respects be affirmed.

Respectfully submitted,  
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May 17, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and I further certify that I have examined the provisions of Rule 39 of said rules.

I further certify that I have this day served a copy of the foregoing brief on each party of record by mailing three copies thereof via first class mail, postage prepaid, to the attorney of record for each such party.

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Warner W. Gardner

## APPENDIX

Respondents in compliance with Rule 18(f) of this Court list herewith the exhibits relied upon by them in the foregoing brief and the pages of the transcript of record before the Federal Maritime Commission wherein such exhibits were offered and received into evidence.

Ex. No.	Identified	Offered	Received
14	141	141	141
49	666	667	667
60	842	852	854
67 -	1043	1043	1048 -
74			1051
77	1061	1062	1062
79	1090	1090	1091